No. 121.

Brief of Bunn for Appts.

Filed Nov. 1, 1897.

SUPREME COURT OF THE UNITED STAT

OCTOBER TERM, 1897

No. 121

NORTHERN PACIFIC RAILROAD COMPANY A
OTHERS, *Appellants*,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING A
MANUFACTURING COMPANY AND CHICA
ST. PAUL, MINNEAPOLIS AND OMA
RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COU
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANTS.

C. W. BUNN,
Counsel for Appellants.

ABBOTT PRINTING COMPANY, BOOK AND JOB PRINTERS,
91-94 UNION BLOCK, ST. PAUL.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 121

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, *Appellants*,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY AND CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This appeal involves the title to a valuable body of timber land in the Northern part of Wisconsin. The suit was instituted in equity by the Northern Pacific Railroad Company and its Receivers in the Circuit Court of the United States for the Western District of Wisconsin. The bill was demurred to and the demurrer was sustained by the Circuit Court. Decree was entered dismissing the bill and appeal taken to the Circuit Court of Appeals for the Seventh Circuit where the decree was affirmed. The opinion of the Circuit Court of Appeals is at p. 59 and following of the Transcript.

The facts alleged in the bill are well and sufficiently stated by the Circuit Court of Appeals in its opinion. The complainants (appellants here) assert title under the third section of the act of Congress approved July 2, 1864, which, so far as it bears upon the questions involved, is as follows:

"Sec. 3. *And be it further enacted*, that there be and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act." 13 Stats. 365.

The Northern Pacific Company accepted this grant December 29, 1864. On July 30, 1870, it fixed the general route of its road extending through Wisconsin within twenty miles of the lands in controversy. Thereafter it

proceeded with the survey and location of its line, and on July 6, 1882, definitely fixed that portion of its line extending opposite these lands by filing a plat thereof in the office the Commissioner of the General Land Office. The lands in controversy are within the place limits of the grant according to the plat of definite location. By September, 1882, the company had completed that part of its road coterminous with these lands and the same was examined and approved by commissioners appointed by the President as provided for in the Northern Pacific charter. These facts show that the legal title to these lands vested in the Northern Pacific Company under the act of Congress, unless they fall within the exceptions enumerated in the act. Such exceptions are of lands "sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of" when the line of road was definitely fixed.

The facts relied on to except the lands from the Northern Pacific grant are as follows: By an act entitled "An act granting lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856 (11 Stat. 20), Congress granted to the State, for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City to St. Croix river or lake, between townships twenty-five and thirty-one, and thence to the west end of Lake Superior and to Bayfield, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road. The act further provided that, in case it should appear that the United States had, when the line of said road was definitely located, sold any sections or parts thereof, granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of the State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections or parts of sections above specified, so much lands, in alternate sections, or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption had attached: Provided,

lhat the lands so located should in no case be furth
than fifteen miles from the road, and selected for and
account of such road.

The State accepted this grant and bestowed that po
tion of it which pertained to the line from the St. Croi
river, or lake, to the west end of Lake Superior and
Bayfield upon the St. Croix and Lake Superior Railroa
Company. On September 20, 1858, this company definitel
located the line of its road between these points. Th
lands in controversy did not fall within either the plac
or indemnity limits as established under this grant.

By an act approved May 5, 1864 (13 Stat. 66), entitle
"An act granting lands to aid in the construction of cer
tain railroads in the State of Wisconsin," it is provided

"Section 1. That there be and is hereby granted t
the State of Wisconsin, for the purpose of aiding
in the construction of a railroad from a point on the
St. Croix river, or lake, between townships twenty-
five and thirty-one, to the west end of Lake Supe-
rior, and from some point on the line of said rail-
road, to be selected by said State, to Bayfield, every
alternate section of public land, designated by odd
numbers, for ten sections in width on each side of
said road, deducting any and all lands that may have
been granted to the State of Wisconsin for the same
purpose, by the act of Congress of June three,
eighteen hundred and fifty-six, upon the same terms
and conditions as are contained in the act granting
lands to the State of Wisconsin, to aid in the con-
struction of railroads in said State, approved June
three, eighteen hundred and fifty-six. But in case
it shall appear that the United States have, when
the line or route of said road is definitely fixed,
sold, reserved, or otherwise disposed of, any sec-
tions or parts thereof, granted as aforesaid, or that
the right of pre-emption or homestead has attached
to the same, then it shall be lawful for any agent
or agents, to be appointed by said company, to
select, subject to the approval of the Secretary of
the Interior, from the public lands of the United
States nearest to the tier of sections above specified,
as much land in alternate sections or parts of sec-
tions, as shall be equal to such lands as the United
States have sold or otherwise appropriated, or to

> which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than twenty miles from the line of said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist."

The State accepted this act March 20, 1865, and on the same day conferred all the lands,. rights and privileges granted by the above section, upon the St. Croix and Lake Superior Railroad Company. That company accepted the grant April 22, 1865, and by a resolution of its executive committee adopted the line as already located under the act of June 3, 1856, as the line of the road under the act of May 5, 1864. On May 5, 1865, copies of these resolutions, and of the act of the legislature of Wisconsin conferring this grant upon the St. Croix and Lake Superior Railroad Company were filed with the Secretary of the Interior. On February 28, 1866, the Commissioner of the General Land Office directed the register and receiver of the district land office to withhold the odd-numbered sections within ten and twenty miles of said line, so fixed, from sale or location, pre-emption settlement or homestead entry. This order was received and filed in the district land office on March 17, 1866.

The lands in controversy lie within the twenty mile limits of this withdrawal, but are more than fifteen miles from the line as fixed. The St. Croix and Lake Superior Railroad Company having failed to construct said railroad, the grant to it was forfeited to the State. In February, 1882, the appellee, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereinafter called the Omaha

Company, succeeded, under legislation of the State, to the rights of the St. Croix and Lake Superior Railroad Company; and during that year it completed the road past these lands and to the west end of Lake Superior. On May 12, 1883, and June 14, 1883, one W. H. Phipps, as agent for the Omaha Company, filed lists for selection of indemnity lands claimed as inuring to said company under said grant, including among others the lands in controversy. These selections were allowed by the officers of the district land office, but were never approved by the Commissioner of the General Land Office nor by the Secretary of the Interior. The Governor of the State of Wisconsin caused patents for the lands in controversy, with other lands, to be issued to the Omaha Company. In 1885 and 1886 the Omaha Company executed deeds for these lands to the grantors of the Musser-Sauntry Land, Logging and Manufacturing Company, which company acquired whatever interest was conveyed to the Omaha Company by the State. The Secretary of the Interior having completed the adjustment of the grants made by the acts of 1856 and 1864, it was ascertained in 1889 that these grants were satisfied without the lands in controversy; and on November 25, 1889, the Omaha Company relinquished these lands with others, and requested that the attempted selection should be cancelled, which cancellation was made in February, 1890. In November, 1889, the Musser-Sauntry Company, having ascertained that these lands would not inure to the railroad company under the grant, applied to purchase the same under the provisions of an act of Congress approved March 3, 1887. The register and receiver of the district land office, disregarding the Northern Pacific Company's protest, allowed the application, and accepted the cash tendered for the land. In February, 1890, the Secretary of the Interior, in a ruling made in the course of the adjustment of the Omaha Company's grant, held that the indemnity lands under the act of May 5, 1864, reserved by order of the Commissioner of the General Land Office of February 28, 1866, were, by reason of such reservation, excepted from

the operation of the grant to the Northern Pacific Company. On December 19, 1890, this ruling was reaffirmed and is still in force in the Department. On March 5, 1891, in accordance with the rulings of the Secretary, the Musser-Sauntry Company made a new application to purchase the lands in controversy, which was allowed; and on May 5, 1891, the Musser-Sauntry Company made a cash entry of these lands. The Northern Pacific Company appealed from this allowance, but on October 3, 1892, the Commissioner of the General Land Office affirmed it, holding that these lands were excepted from the operation of the grant to the Northern Pacific Company because of the withdrawal order of 1866.

ASSIGNMENT OF ERRORS.

The errors are properly assigned in the record (Transcript, pp. 60–62).

The whole question involved in the case is presented by the second assignment of error which is: "That said court held that the lands in controversy were reserved and excepted from the grant to said Northern Pacific Railroad Company by the order of withdrawal made February 28, 1866."

ARGUMENT.

The question for decision is this: Whether withdrawal from sale by the Land Department for the purpose of indemnity for possible losses in one railroad grant is a "reservation" or "disposal of" such lands so as to except them from the place limit grant of another railroad company.

It is utterly immaterial to this question which grant is prior; whether the Omaha grant or the Northern Pacific grant was earlier in date, because it is familiar and elementary law, that so far as the rights of the Omaha company are concerned, it acquired no title to, or right in this land until it made selections for indemnity approved by the Secretary. On the approval of such selec-

tions that company's title would become effective as of the date of the selection. It would not relate back to the date of the grant. On the other hand, the Northern Pacific Company's title (if that could attach) related back to the date of its grant, the lands being place lands within the description of the act. Therefore the question is exactly the same as it would be had the Omaha grant been subsequent to the Northern Pacific and the Omaha withdrawal prior to the definite location of the Northern Pacific. The whole question in either case being whether a withdrawal for indemnity under one grant, existing when a definite line is fixed under another grant, will constitute the lands "reserved" or "disposed of" so as to except them from the place limit grant of such other company.

The whole question is this: What is the true meaning of the words in the Northern Pacific and other similar grants "sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of." The policy which dictated the use of these words has been frequenly stated by this court and there ought to be now little doubt left as to their meaning. By the use of these words Congress indicated its intention to leave the public domain open to settlement pending the location of the railroads, and also to leave it open for the government to reserve whatever lands might be found necessary for public purposes, public buildings, forts, arsenels, Indian reservations and the like. But the decisions of this court, as we understand them, lend no support to the supposition that Congress intended to subtract from such grants any land in favor of other similar railroad grants subsequently attaching.

Counsel for the Omaha Company, in their brief before the Circuit Court of Appeals, treat this case as if it were the policy of Congress, that every railroad grant should be allowed its full quota of indemnity, as against any subsequent *place* grant made by Congress. Right here we take issue with counsel. The rule settled in this court is that a grant does not convey indemnity land. For losses in granted lands the company is given

a right to select indemnity within certain limits, PROVIDED there are public lands within those limits subject to the selection when that is made and approved by the Secretary. But the right of the government grantee does not attach to such lands as of the date of the grant or by force of the grant. It attaches as of the date of the selection and by virtue of the selection. If the land has been specifically conveyed by a later grant before that time, it is not subject to selection and the company having the right to select has no reason to complain. The Omaha grant itself contains an exception of lands sold, reserved, or disposed of at the time its line is definitely fixed, and, as the Northern Pacific grant of place lands became effective as of the second day of July, 1864 upon the definite location of that road, such lands were taken out of the Omaha grant under the terms of the exceptions in that grant. It was decided by this court at the last term (*Northern Pacific Railroad Company* vs. *Sanders*, 166 U. S. 620), that a withdrawal on general route did not prevent the attachment of rights of third persons to the land, and the same principle would seem to apply to withdrawals for mere indemnity, either on general route or definite location.

Congress made many grants to railroad companies between 1855 and 1875. It could not know which of the lines aided would be built; it did know that many of them would not be built for years, and perhaps not at all. These grants overlapped and touched each other, or might overlap and touch each other, depending on the location of the railroads; and, if the decision of the courts below in this case is correct, it follows that place grants might be utterly defeated by mere withdrawal from sale for the purpose of indemnifying possible losses in other grants, where it would be eventually determined as it was in this case, that the lands were unnecessary to fill such losses.

The question is whether such withdrawals from public sale constitute a "reservation" or "disposition of" such lands within the intent of Congress. We submit that the word "reserved" means reserved for some public pur-

pose, and not merely withheld from sale to fill possible losses in a private grant to another railroad. The intention of Congress was first to promote settlement; second, not to embarrass public functions or operations of the United States. This purpose is fully subserved by reading the word "reserved" as including only reservations for some public or governmental purpose, and as excluding a mere withholding from public sale in order to satisfy possible losses, not yet determined to exist, in another private grant standing on the same footing as to equity and justice, and having no relation to any public or governmental use. The meaning of the word "reserved," in the Northern Pacific grant, was discussed by Mr. Justice Brewer (then Circuit Judge) in *Northern Pacific Railroad Company* vs. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 Fed. Rep. 551–558. As there held, the word "reserved" must be construed *noscitur a sociis*. The words are in one clause of the grant "reserved, sold, granted, or *otherwise appropriated*," in another clause of the grant "sold, reserved, or *otherwise disposed of*." The word "reserved" is thus used as one of the methods of appropriation or disposal. It cannot, we submit, fairly be said that lands reserved for indemnity for unascertained and only possible losses, while yet unselected, are lands "appropriated" or "disposed of." They are not appropriated or disposed of until selection. We think the decisions of this court sustain our position.

In *Missouri, Kansas and Texas Railway Company* vs. *Kansas Pacific Railway Company*, 97 U. S. 491, p. 498, the court used this language:

> "The object of the reservation was to protect the acquisition of rights in this way to lands falling within the limits of the grant, and to exclude from its operation lands especially reserved, and lands of a special character, such as mineral lands other than those of iron or coal, the sale of which was seldom permitted anywhere, and swamp lands. The grant made was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially

> withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands, or mineral lands the sale of which was then against the general policy of the government. *It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.*"

In the case of *St. Paul and Pacific Railroad Company* vs. *Northern Pacific Railroad Company*, 139 U. S. 1, the court considered the conflict at the intersection of the Northern Pacific grant and the St. Paul and Pacific grant. It was held the St. Paul and Pacific grant was later in point of time. The case involved both place lands and indemnity lands. The argument was made by counsel (see Judge Young's brief) that upon the filing of the Northern Pacific plat the grant attached to those odd sections only, to which the United States at that moment had full title, which they had not previously sold, granted, reserved, or otherwise appropriated; that it did not attach to any lands which before that moment had been granted to the State to aid the St. Paul and Pacific Company's line. But this court said, p. 17:

> "But we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Missouri, Kansas & Texas Railway* vs. *Kansas Pacific Railway*, 97 U. S. 491, 498, 499."

As to lands withdrawn for indemnity for the Northern Pacific Company, which fell within the place grant of the St. Paul and Pacific Company, the court was apparently careful *not* to hold that the withdrawal for indemnity would except the lands out of the St. Paul and Pacific grant. The ground on which the court placed the award of these lands to the Northern Pacific was, that all the lands within such indemnity limits were not sufficient to satisfy the ascertained losses; that there was therefore no occasion for the exercise of any right of selection, for they were all appropriated by the grant. It was a case

where the grantee had a right to select and receive every acre of land within the indemnity limits and more, and where, consequently, there was no occasion for any selection, the indemnity lands passing by the grant itself.

But the court did decide that lands included in a subsequent railroad grant were not lands granted or disposed of by the United States within the true meaning of the exceptions in the Northern Pacific grant. If the word "granted" in the Northern Pacific grant was not intended to include subsequent grants to aid other railways, why should the word "reserved" in the Northern Pacific grant be construed to include subsequent indemnity reservations for the benefit of another railway?

It was held in *United States* vs. *Oregon Central Railroad*, 57 Fed. Rep. 890, that a withdrawal for the benefit of the Oregon Central Railroad Company under its grant, made before the Northern Pacific had definitely fixed the location of its road, was not such a reservation as took the lands out of the Northern Pacific grant.

In *United States* vs. *Southern Pacific Railroad Company*, 146 U. S. 570, the Commissioner of the General Land Office withdrew the lands in controversy for the benefit of the Southern Pacific Company before the line of the Atlantic and Pacific was definitely fixed. The contention of the Southern Pacific was that the lands in controversy were therefore reserved at the time of the definite location of the Atlantic and Pacific. The question was there clearly presented to the court and necessarily passed upon. The case is therefore authority that the word "reserved" in this and similar clauses is subject to the same limitations that apply to the word "granted" in the same clause; it does not include a withdrawal from sale after the date of the grant for the purpose of aiding in the construction of another railroad.

The case of *Kansas Pacific Railroad Company* vs. *Atchison, Topeka and Santa Fe Railroad*, 112 U. S. 414, decides the same question. The lands in controversy in that case were within the place limits of the act of Congress of July 2, 1864, to aid in the construction of the Kansas Pacific Railroad. The company filed its map of definite

location January 10, 1866, and the lands were within its place limits. March 3, 1863, Congress passed an act granting lands to the State of Kansas to aid in the construction of a certain railroad, and on March 3 of the same year the Commissioner made a withdrawal, which included the lands in controversy. January 1, 1866, a definite location map was filed by the Atchison, Topeka and Santa Fe Company, beneficiary under this grant. It was held in the Circuit Court that the effect of this reservation was to exclude the lands from the Kansas Pacific grant. But this court reversed the ruling, saying:

> "The order of withdrawal of lands along the probable lines of the defendant's road made on the nineteenth of March, 1863, by the Commissioner of the General Land Office affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant."

In *St. Paul Railroad* vs. *Winona Railroad*, 112 U. S. 720, this court, speaking of the effect of a withdrawal of indemnity lands as against another railroad grant, says:

> "It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, *or of any other company to select, which has the same right of selection within those limits.*"

In *Atchison, Topeka and Santa Fe Railroad Company* vs. *Rockwood*, 25 Kan. 292, the court, in speaking of an executive order of withdrawal, reserving indemnity lands for the benefit of a railroad grant made July 26, 1866, which withdrawal was in existence at the date of the definite location of the Atchison Company's road under the grant made by Congress of March 3, 1863, says:

> "The withdrawal was simply intended to prevent persons who had no interest in the lands, or no interest prior to that of the Missouri, Kansas and Texas Railway Company, from acquiring any such inter-

> est, and not to prevent persons who did have some interest in the lands, prior to that of the Missouri, Kansas and Texas Railway Company, as the plaintiff in error in this case had, from perfecting such interest. * * * We only wish to say that the withdrawal did not operate to prevent the plaintiff from receiving and procuring any lands belonging to the United States, and otherwise subject to the plaintiff's grant, which had not yet been selected by the Missouri, Kansas and Texas Railway Company. We think that such lands were subject to the plaintiff's grant the same as though no such withdrawal had ever been made."

The case of *Sioux City and St. Paul Railroad Company* vs. *Chicago, Milwaukee & St. Paul Railway Company*, 117 U. S. 406, involves the same principle. The grant to each company in this case was by the same act. The lands had been withdrawn as indemnity for the Sioux City and St. Paul Railroad Company in 1867. After that date, in 1868, the Chicago company changed the location of that portion of its road coterminuus with a portion of the lands. So much, therefore, of the lands as fell within the place limits of the Chicago Company were reserved for demnity on behalf of the Sioux City Company at the time the Chicago Company definitely fixed its location. This court held that the title to the indemnity lands took effect only from the date of selection, and that where lands fell within the place limits of one grant and the indemnity limits of another, they should be awarded to the company in the place limits of which they fell, regardless of whether they were withdrawn by executive order for the benefit of the other company at the time of definite location of the road in the place limits of which the lands fell.

Our contention is also confirmed by the case of *United States* vs. *Colton Marble and Lime Company*, 146 U. S. 615. In this case it appears that the lands in controversy were within the indemnity limits of the Atlantic and Pacific grant of 1866 as defined by its map of definite location filed April 11, 1872. They also fell within the place limits of the grant to the Southern Pacific Railroad Company under the act of March 3, 1871. The Southern Pacific

Company had filed a map of the route of its road under this act April 3, 1871, more than a year before the filing of its map by the Atlantic and Pacific Company, and the land had, at that time, been withdrawn for the benefit of the Southern Pacific Company by order of the Commissioner of the General Land Office of April 21, 1871. It was held, however, that the map filed by the Southern Pacific Company April 3, 1871, was a map of general route, instead of a map of definite location. (See *U. S.* vs. *S. P. R. R. Co.*, 146 U. S. 598 to 603). The map of definite location was not filed by the Southern Pacific Company until 1874. (See 146 U. S. 602). As at this time the lands were, as we have stated, withdrawn by order of the Interior Department for the benefit of the Atlantic and Pacific Company, the case presents precisely the same facts as are presented by the case at bar, to-wit: a conflict of title between unselected indemnity lands claimed under the earlier grant, and place lands under the later grant, there being an executive order withdrawing the indemnity lands for the benefit of the earlier grant made *after* the date of the later grant, and *prior* to the time the map of definite location thereunder was filed. While in the case referred to the court held that the indemnity lands were excepted from the Southern Pacific grant, it plainly appears, from a reading of the opinion, that this result was arrived at solely because of a peculiar clause in the Southern Pacific grant, providing that it "should in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Company, or any other railroad company."

The court, referring to this clause, says:

> "Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions *different from* those generally imposed in such cases." p. 617.

In *St. P., M. & M. Ry. Co.* vs. *H. & D. Ry. Co.*, decided by the Commissioner of the General Land Office December 11, 1889, was involved the question of the superiority of title as between two railroad companies to lands in their

common indemnity limits. The grant to the St. Paul, Minneapolis & Manitoba Railway Company was made by acts of Congress approved March 3, 1857 (11 Stat. 195), and March 3, 1865 (13 Stat. 536). The Hastings and Dakota Railway Company claimed under an act of Congress approved July 4, 1866 (14 Stat. 87), and the lands were within its indemnity limits as defined by its map of definite location, and were withdrawn by the Commissioner of the General Land Office April 22, 1868. They were also within the Manitoba Company's indemnity limits. The Commissioner of the General Land Office, in disposing of the conflicting rights, says:

> "I am of the opinion that either company is entitled to the right of selection, and that priority of right to the land is secured by the company which first presents its application to select the same, without regard to the dates of the grants, definite location of the lines, *or withdrawal of the lands.*"

This accords with the decision of this court in *St. Paul Railroad* vs. *Winona Railroad*, 112 U. S. 720.

If the decision of the Commissioner in this case is law, *a fortiori* is the principle applicable to the case at bar. If lands, which are withdrawn as indemnity in favor of a company having an earlier grant, may be taken as indemnity by a company having a later grant, the priority of right depending entirely on priority of selection, it is still more clear that lands withdrawn as indemnity for one company would pass by a later place grant to another company.

The court below was in error in applying to this case the decision in *Wolcott* vs. *Des Moines Co.*, 5 Wall. 681. That case rests upon peculiar facts and peculiar language in the granting act, both of which distinguish it widely from this case. In that case the grant to the State of Iowa to aid the improvement of the Des Moines river was under consideration. The grant was made several years before the railroad grant with which it was claimed to conflict. The Des Moines river grant was "for the purpose of aiding said territory to improve the navigation of Des Moines river from its mouth to the Raccoon Fork,

so called, in said territory, one equal moiety in alternate sections of the public lands in a strip five miles in width on each side of the river." A controversy had for years existed in respect to whether this grant extended the whole length of the river or only northwardly to the Raccoon Fork. Mr. Justice Nelson states the facts in regard to this controversy as follows:

> "Some year and a half after the passage of this act a question arose before the commissioner of the land office whether the grant of the odd sections within the five miles extended above this Fork. He determined that it did, and that it extended throughout the whole line of the river within the limits of Iowa. It appears, however, that he afterwards changed his opinion, and on the nineteenth June, 1848, a proclamation was issued by the President, countersigned by him, ordering a sale of some of these odd sections, among other lands lying above the Fork, and which was to take place in the following October. On the attention of the Secretary of the Treasury being called to the subject, he, after an examination of the act, determined that, upon a true construction of it, the grant extended above the Raccoon Fork, and directed that the odd section should be reserved from the sale, which was done accordingly, and the State of Iowa duly notified. This was on the sixteenth June, 1849. On the sixth April, 1850, the Secretary of the Interior, whose department had in the meantime been established, and to which the supervision and control of the General Land Office had been assigned, reversed the previous decision of the Secretary of the Treasury, and determined that the grant did not extend beyond the Raccoon Fork. But he directed that the lands should be reserved from sale which were embraced within the State's selections. The question was then brought before the President, and was referred by him to the Attorney General, who differed with the Secretary of the Interior, and concurred with the Secretary of the Treasury. But before the promulgation of this decision the President (Taylor) died, and a new cabinet coming in—and among others a new Attorney General—he overruled the decision of his predecessor and affirmed that of the Secretary of the Interior. The case

was then brought before the new President and cabinet, and the result is stated by the then Secretary of the Interior, under date of October 29, 1851, which was 'that in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve of the selections, without prejudice to the rights, if any there be, of other parties.' Under this arrangement the Secretary of the Interior approved of the odd sections above the Fork as certified, according to the act of Congress, till, in December, 1853, the number of acres amounted to over 271,572. On the twenty-first March, 1856, the commissioner of the land office again decided that the grant was limited to the Raccoon Fork, and the question was again referred to the Attorney General, who advised the Secretary of the Interior to acquiesce in the views of his predecessor (a change having taken place as to the incumbent), and to continue the approval of the lands as certified to him under the law, which was done accordingly. In the meantime, the improvement of the Des Moines river had been carried on by the State, and by the Des Moines Navigation and Railroad Company, who on the ninth June, 1854, had entered into an engagement with the State to finish the improvements, as contemplated by the act of Congress, and to expend for that purpose some $1,300,000.

"The question as to the true construction of this grant of eighth August, 1846, and in respect to which such great diversity of opinion existed among the executive officers of the government, came before this court, and was decided at the December term, 1859–60. The court held that it was limited to the Raccoon Fork, and did not extend above it."

Pending this controversy, and while litigation over it was being tried in the courts, Congress passed the railroad grant of May 15, 1856, containing this provision: "*That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpos of aiding in any objects of*

internal improvements, or for any purpose whatever, be and the same is hereby reserved from the operation of this act." This court held that Congress, in the passage of this proviso, had specially in mind the previous grant, the conflict of opinion concerning it and the pending litigation; that the peculiar words of the proviso point almost directly to this prior grant and to the dispute arising out of it among the public authorities. The improvements of the Des Moines river were then in progress, and if it turned out that the true construction of the act carried the grant above the Raccoon Fork, then no further legislation was necessary. But if the litigation turned out the other way, then Congress desired to make such provision as might be just with the lands north of Raccoon Fork claimed to come within the Des Moines river grant.

It will be noticed that substantially the same language was used in the St. Paul and Pacific grants, considered by Mr. Justice Brewer in *Northern Pacific Railroad Company* vs. *St. Paul, Minneapolis and Manitoba Railway Company*, 26 Fed. Rep. 551. There is no similar or equivalent language in the Northern Pacific grant; no reference to any existing reservation, or grant for a public purpose made by Congress. The Northern Pacific grant is of the odd sections, public at the date of the grant, whenever on the line of the road the United States has full title, not reserved, sold, granted, or otherwise appropriated. There is no exception of lands HERETOFORE reserved. The exception is of lands which may be reserved or otherwise disposed of at the date of definite location, and Congress could not have had in mind *any* withdrawal from sale, which the land department might choose to make in the future, for the purpose of indemnifying losses in some other private grant, whether later or earlier.

This case is distinguishable and entirely different from cases where the reservation or withdrawal is in existence at the time the grant is made. Such reservations are presumably within the knowledge and intent of Congress when making the grant, and under the decisions of this court have the effect to take such reserved lands out of the body of public lands presumed to be contem-

plated by the grant. But we think there is no decision of this court which places reservations for indemnity made after a grant upon a similar footing. As to lands so subsequently reserved, the ordinary rule applies that he who is prior in time is first in right; and a grant of lands in place with definite location thereunder is prior in time, because indemnity lands vest only upon selection. The general proposition is established beyond question, that in case of conflict between the place limits of one grant and indemnity limits of an earlier grant, the lands will pass as place lands under the later grant. *H. & D. Ry. Co.* vs. *St. Paul, S. & T. F. Ry. Co.*, 32 Fed. Rep. 821; *Sage* vs. *St. Paul, S. & T. F. Ry. Co.*, 44 Fed. Rep. 817; *United States* vs. *Colton Marble & Lime Co.*, 146 U. S. 615.

C. W. BUNN,
Of Counsel.